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ESTABLISHMENT OF AN INTERNATIONAL
CRIMINAL COURT
16 March-3 April 1998

ESTABLISHMENT OF THE COURT AND RELATIONSHIP WITH THE UNITED NATIONS*[1]

List of main issues

I. Financing of the Court

A. States Parties.

B. The United Nations.

C. Others.

D. Voluntary funding: States, individuals and other entities.

II. Organizational matters

A. Relationship with the United Nations:

- Possible alternatives (see annex: background paper);

- Matters to be addressed.

B. Privileges and immunities.

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* Any suggestions on this subject should be submitted to the Secretariat as soon as possible but no later than 15 January 1998.

[1] This paper is intended for use in Working Group 8 (Working Group on the Establishment of the Court and Relationship with the United Nations).

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C. States Parties meetings and their organization.

D. Preparatory Commission.

E. Oversight mechanisms for dealing with administrative and financial matters.

F. Headquarters Agreement.*

G. Representation at the United Nations.*

H. Matters pertaining to personnel (staff regulations, pension, appeals).*

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* These subjects may not have to be dealt with in the ICC Statute.

Annex

POSSIBLE TYPES OF RELATIONSHIP BETWEEN THE UNITED NATIONS AND A PERMANENT INTERNATIONAL CRIMINAL COURT

Background paper prepared by the Codification Division, Office of Legal Affairs

I. INTRODUCTION

1. The draft Statute prepared by the International Law Commission contains a provision entitled "Relationship of the Court to the United Nations" reading:

> "The President, with the approval of the States Parties to this Statute ("States Parties"), may conclude an agreement establishing an *appropriate* relationship between the Court and the United Nations" (article 2, emphasis added).

2. The above provision was only discussed very briefly in the Ad Hoc Committee in 1995 and in the Preparatory Committee in 1996. The main points raised by the delegations during the discussion may be summarized as follows:

(a) A close relationship between the Court and the United Nations was regarded as an essential condition of the universality and moral authority of the Court, though such a relationship should in no way jeopardize its independence;

(b) A special agreement, elaborated either simultaneously with the Statute or at a later stage, to be concluded between the two institutions was considered to be appropriate for the establishment of such a relationship. The agreement should be approved by the States parties to the Statute;

(c) The Statute should contain provisions pertaining to the general principles and substantive questions, leaving the Relationship Agreement to cover technical questions;

(d) A view was expressed that the Court should have a status analogous to that of a specialized agency, but this gave rise to a number of reservations;

(e) Some delegations were in favour of the Court being financed from the regular budget of the United Nations, as is the case with human rights monitoring bodies, since the Court will be dealing with international concerns and its financing should be certain and continuing. Others considered that the independence of the Court required States parties to finance it through their own contributions. Yet others suggested that States initiating cases, interested States or the United Nations (when the Security Council had referred a matter to the Court) could contribute to the financing of the Court.

3. The present paper is intended to provide some background information with a view to facilitating the discussion on this matter.

4. On the basis of existing practice, three possible types of relationship between the proposed International Criminal Court (hereafter "the Court") and the United Nations may be envisaged: as an organ of the United Nations, as a "treaty body" of the United Nations, or as an independent organization. These three alternatives are discussed below.

II. AS AN ORGAN OF THE UNITED NATIONS

A. As a principal organ of the United Nations

5. The principal organs of the United Nations and their respective powers and functions are specified in the Charter of the United Nations. Consequently, if the Court were to be a principal organ of the United Nations, the Charter itself would have to be amended. Article 108 sets out the procedures to be followed for amending the Charter.

B. As a subsidiary organ of the United Nations

6. Article 7, paragraph 2, of the Charter envisages the establishment of "such subsidiary organs as may be found necessary". Furthermore, Articles 22, 29 and 68 specifically authorize the establishment, by the General Assembly, the Security Council and the Economic and Social Council respectively, of subsidiary organs necessary for the performance of their functions.

7. Pursuant to these provisions, numerous subsidiary bodies have been established and undertake a variety of tasks in accordance with their mandates. A few such bodies have been entrusted with judicial functions, in particular the Administrative Tribunal of the United Nations,[1] the United Nations Compensation Commission,[2] the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[3] and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Suc

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[1] See General Assembly resolution 351 A (IV) of 24 November 1949.

[2] See Security Council resolutions 687 (1991) of 3 April 1991 (section E) and 692 (1991) of 20 May 1991.

[3] See Security Council resolution 827 (1993) of 25 May 1993.

Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994,[4] as well as the now defunct United Nations Tribunal in Libya[5] and the United Nations Tribunal in Eritrea.[6]

8. If the Court were to be established as a subsidiary organ, the question as to which principal organ would be the most appropriate for creating such subsidiary organ should be considered. An answer thereto would require a careful examination of the respective competences and functions of each of the principal organs.

9. A subsidiary organ is usually created by the adoption of a resolution by the parent body. The mandate and structure of the subsidiary body may be spelled out in the resolution itself or in a statute annexed to the resolution.

10. Regarding the compatibility between the subsidiary nature of such body and the independence which should characterize a truly judicial body, the International Court of Justice, in 1954, confirmed the power of a principal organ to establish as a subsidiary organ an independent judicial body whose decisions are binding on that principal organ; the subsidiary nature of such judicial organ resides in the fact that the principal organ has the power to establish and abolish the former as well as to change its mandate.[7]

III. AS A "TREATY BODY" OF THE UNITED NATIONS

11. Some of the multilateral treaties which were adopted by the United Nations or by conferences under its auspices, and which deal with subject matters pertinent to the work of the Organization have established mechanisms for the performance of certain specific functions prescribed therein. In view of their close links to the Organization, bodies thus established are generally known as "treaty bodies" of the United Nations. Some of them are composed of experts, others of State representatives.[8] Those composed of experts are more relevant for the present analysis and will therefore be the focus of this section. Primary examples of such expert treaty bodies include the monitoring bodies of

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[4] See Security Council resolution 955 (1994) of 8 November 1994.

[5] See General Assembly resolution 388 (V) of 15 December 1950.

[6] See General Assembly resolution 530 (VI) of 29 January 1952.

[7] See Effect of awards of compensation made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, pp. 53 and 61.

[8] Treaty bodies composed of representatives of States include the meetings of the States Parties to certain instruments and the Review Conferences under a number of arms control treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons.

human rights treaties[9] and the Commission on the Limits of the Continental Shelf. Their special features are summarized below.

12. The United Nations provides all necessary secretariat services to these treaty bodies. The tasks involved include preparation of reports, production o documents, communication with experts and provision of conference services.

13. Although the members of the monitoring bodies of human rights treaties and of the Commission on the Limits of the Continental Shelf are elected by the States parties, this does not affect the nature of the relationship of these bodies with the United Nations.

14. Members of expert treaty bodies have the status of "experts on missions" for the United Nations within the meaning of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations.[10] As such, they are to be accorded "such privileges and immunities as are necessary for th independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions", as provided for in that article.

15. The monitoring bodies of human rights treaties are now all financed by the regular budget of the United Nations, including as regards the emoluments of their members.[11] However, the Committee on the Elimination of Racial Discrimination and the Committee against Torture were originally financed by th States parties, respectively, in part or in whole. Subsequently, amendments were adopted by the States parties whereby the United Nations was to finance th

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[9] These are: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. The Committee on Economic, Social and Cultural Rights was not provided for in the International Covenant on Economic, Social and Cultural Rights; it was set up in 1985 by the Economic and Social Council (resolution 1985/17) as a subsidiary organ of the Council. Although it functions to a larg extent in the same manner as the committees established under other human right treaties, it is not included here as it is not a treaty body.

[10] United Nations, Treaty Series, vol. I, No. 4, p. 15.

[11] With the minor exception of the ad hoc Conciliation Commission that may be established by the Human Rights Committee under article 42 of the International Covenant on Civil and Political Rights in connection with a clain by a State party that another State party is not fulfilling its obligations; th expenses of the Commission's members are to be borne by the States parties concerned. States parties to a relevant instrument that are not Members of the United Nations contribute to the financing of treaty bodies in accordance with regulation 5.9 of the Financial Regulations of the United Nations.

expenses of these two organs.[12] These amendments were endorsed by the General Assembly,[13] and, since 1 January 1994, these two committees have thus been financed from the regular budget of the United Nations.

16. The Commission on the Limits of the Continental Shelf is partially financed by the United Nations budget. The expenses of each member of the Commission, while in performance of Commission duties, are defrayed by the State party nominating that member. The expenses incurred in respect of scientific and technical advice requested by a coastal State are also defrayed by that State.

17. The above-mentioned expert treaty bodies submit a report to an organ of the United Nations.[14]

18. Notwithstanding the administrative and budgetary links of these treaty bodies with the United Nations, they perform their functions in accordance with their constituent instruments. Any change in such instrument requires a formal amendment thereto, which cannot be effected merely by means of a resolution or a decision of a United Nations organ.[15]

19. Where multilateral treaties establishing treaty bodies are formally adopted by the General Assembly,[16] such action by the Assembly constitutes acceptance to undertake the obligations conferred by the treaty on the United Nations. In other cases, a separate decision to that effect by the competent United Nations organ is required.[17]

20. As indicated above, the Secretariat of the expert treaty bodies of the United Nations, which is normally relatively small and entails limited costs, forms part of the United Nations Secretariat. The United Nations provides also

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[12] This was done, in particular, in recognition of the relevance of the functions of these bodies to the purposes of the United Nations and also partly as a result of the failure of certain States parties to fulfil their financial obligations.

[13] See General Assembly resolution 47/111 of 16 December 1992.

[14] In accordance with article 6 of Annex II of the United Nations Convention on the Law of the Sea, the Commission on the Limits of the Continental Shelf shall submit its "recommendations" to the Secretary-General.

[15] See United Nations Juridical Yearbook, 1976, pp. 200-201.

[16] This was the case of the human rights treaties establishing the above-mentioned monitoring bodies.

[17] See United Nations Juridical Yearbook, 1969, p. 207. Thus, in the case of the International Narcotics Control Board, which was established by the Single Convention on Narcotic Drugs adopted by a United Nations conference on 30 March 1961, the Economic and Social Council in its resolution 1196 (XLII) of 16 May 1967 accepted the consequential organizational and financial obligations of the United Nations.

other administrative and technical as well as financial support[18] to such bodies.[19]

IV. AS AN INDEPENDENT INTERNATIONAL ORGANIZATION

21. If the Court were to be established as an independent international organization, it could be brought into a legal relationship with the United Nations by an agreement concluded between the two organizations.

22. A number of intergovernmental organizations maintain such legal relationship with the United Nations. This is first and foremost the case of specialized agencies, which conclude relationship agreements with the United Nations as envisaged in Articles 57 and 63 of the Charter. Such agreements address, in particular and to varying degrees, the following matters: mutual representation; exchange of information and documents; coordination as regards membership; observance of recommendations of United Nations organs by the specialized agencies; assistance to United Nations organs by specialized agencies; budgetary cooperation; harmonization of personnel standards and administrative procedures; right of the specialized agencies to request an advisory opinion of the International Court of Justice; and unification of statistical services. In addition, specialized agencies generally participate in the United Nations common system of salaries and in the United Nations Joint Staff Pension Fund.

23. Where the creation of an international institution is the result of a multilateral treaty adopted under United Nations auspices, as was the case with the United Nations Convention on the Law of the Sea, a decision to conclude a relationship agreement may be taken by the General Assembly;[20] the constituent instrument of those institutions usually but not necessarily explicitly contemplates the conclusion of such an agreement.[21] Recent examples include the

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[18] It should be noted, however, that some other treaty bodies of the United Nations are financed solely by the States parties.

[19] It should be kept in mind that the Court would be a much more complex organ, with greater requirements in terms of human and financial resources.

[20] See, e.g., General Assembly resolution 51/34 of 9 December 1996, as regards the International Tribunal for the Law of the Sea and the International Seabed Authority.

[21] See, e.g., article 162, paragraph 2 (f), of the United Nations Convention on the Law of the Sea as regards the International Seabed Authority. There is no express provision in the Convention as regards relationship agreements to be concluded by the International Tribunal on the Law of the Sea, but as an independent organization, it has an inherent power to enter into relationship agreements with other international organizations (see the report of the Preparatory Commission, LOS/PCN/152 (vol. II), document LOS/PCN/SCN.4/WP.7, para. 3).

relationship agreements with the International Seabed Authority[32] and the International Tribunal for the Law of the Sea[33] (both created under the United Nations Convention on the Law of the Sea); the conclusion of a relationship agreement with the Organization for the Prohibition of Chemical Weapons is also contemplated. It should be pointed out that drafts for the first two agreements were prepared within the framework of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea.[34]

24. The relationship agreements with the Authority and with the Tribunal both contain provisions on the following matters:

- Mutual recognition of competences;
- Reciprocal representation;
- Exchange of information, data and documents of mutual interest;
- Personnel matters, in particular application of common personnel standards, methods and arrangements;
- Provision of conference services by the United Nations on a reimbursable basis;
- Establishment of close budgetary and financial cooperation or relationship between the organizations;
- Use of United Nations laissez-passer (by officials of the Authority, members of the Tribunal, the Registrar and officials of the Registry).

25. In addition, specific provisions have been made in the above relationship agreements for dealing with matters of concern to certain organs of the United Nations:

- Provision of assistance and information by the Authority to the Security Council as may be required in the exercise of the latter's responsibility for the maintenance of international peace and security;

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[32] The Relationship Agreement between the United Nations and the International Seabed Authority was signed on 14 March 1997 (see A/52/260).

[33] The Relationship Agreement between the United Nations and the International Tribunal for the Law of the Sea is to be signed shortly.

[34] Resolution I annexed to the Final Act of the Third United Nations Conference on the Law of the Sea requested the Preparatory Commission to make recommendations "concerning the relationship between the Authority and the United Nations" (para. 5 (d)) and "regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea" (para. 10).

- Provision of information by the Authority to the International Court of Justice;

- Submission by the Tribunal of reports to the United Nations through the Secretary-General and notification to the Secretary-General regarding a question within the competence of the Security Council.[25]

26. Independent intergovernmental organizations, including the International Tribunal for the Law of the Sea and the Organization for the Prohibition of Chemical Weapons, normally have their own secretariats and are usually financed by the States parties to the relevant constituent instrument or by any other means provided thereunder, such as voluntary contributions.[26]

27. There is, however, the exception of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982[27] which stipulates that, until the end of the year following the Agreement's entry into force (1997), the administrative expenses of the Authority are to be met through the budget of the United Nations. Thereafter, they are to be met by assessed contributions of its members, including any members on a provisional basis,[28] until the Authority has sufficient funds from other sources.[29]

28. It should be clarified that issues such as the privileges and immunities of independent organizations are not dealt with in relationship agreements. They are either provided for in the constituent instruments or form the subject of

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[25] Article 6, paragraph (b), of the draft Agreement with the Tribunal provides that the latter may, when it deems appropriate, "[n]otify the Secretary-General of the United Nations whenever, in its opinion, a question within the competence of the Security Council, in particular relating to the application of article 298, paragraph 1 (c), of the Convention [on the Law of the Sea] arises in connection with the work of the International Tribunal." (Article 298, paragraph 1 (c), of the Convention provides that a State may declare that it does not accept any of the binding dispute settlement procedures established under the Convention in regard of disputes in respect of which the Security Council is exercising the functions assigned to it under the Charter, unless the Council decides to remove the matter from its agenda or calls upon the parties to settle it by means provided for in the Convention.)

[26] See, e.g., article VIII, paragraph 7, of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and articles 171 and 173 of the United Nations Convention on the Law of the Sea.

[27] General Assembly resolution 48/263 of 28 July 1994, annex.

[28] The category of members on a provisional basis is defined in the annex to the Agreement, section 1, para. 12.

[29] Ibid., para. 14.

separate agreements. As regards the International Tribunal for the Law of the Sea, a draft instrument on privileges and immunities was elaborated by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. The text was considered at the Meeting of the States Parties, which then adopted the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea. It may be noted that the Agreement covers also the privileges and immunities of witnesses.

39. If the proposed Court is to be established as an independent organization, it would have the same legal status as that of the International Seabed Authority, the International Tribunal for the Law of the Sea and the Organization for the Prohibition of Chemical Weapons. A legal relationship with the United Nations established by a treaty concluded between two independent international organizations would therefore be appropriate in such case.

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[1] Specialized agencies are covered by the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (United Nations, Treaty Series, vol. 33, No. 521, p. 261).

[2] Document SPLOS/25; the Agreement was opened for signature on 1 July 1997.